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DEPARTMENT PASS USAID FOR MARJORIE COPSON AND FEDERAL TRADE  
 COMMISSION FOR NICK FRANCZYK

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 TAGS: [ECON](#) [EIND](#) [AID](#) [SF](#)  
 SUBJECT: SOUTH AFRICA TOUGHENS ANTITRUST LAW

¶1. (SBU) Summary: South Africa has enacted a law to criminalize cartel activity and regulate abusive oligopolies. The law is largely a reaction to the disclosure of pervasive cartel activity in South Africa. However, the law could complicate the work of the Competition Commission. The Commission has a long-standing relationship with the U.S. Federal Trade Commission and would like additional U.S. assistance in the area of cartel investigation. End Summary.

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 New Law to Toughen Antitrust Enforcement  
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¶2. (U) President Zuma has signed a controversial bill to amend the Competition Act of 1998. The bill aims to strengthen antitrust enforcement in South Africa by:

- Imposing criminal penalties on directors and managers who fix prices, divide markets, or collude on tenders;
- Empowering the Competition Commission to act against oligopolies (called "complex monopolies" in the bill) that undermine competition by engaging in consciously parallel or coordinated conduct (such as price leadership), even when there is no agreement between the oligopolistic firms; and
- Empowering the Competition Commission to engage in broad market inquiries into the state of competition in markets without reference to the conduct of any particular firm.

¶3. (SBU) The move to criminalize cartel activity has sent shock waves through South Africa's business community, which often winks at anti-competitive abuses heretofore treated as civil offenses. However, the bill's criminal provisions are seen as vulnerable to constitutional challenge, as they allow civil findings of cartel activity to be used as prima facie proof of cartel activity in criminal cases, thus shifting part of the burden of proof onto defendants. Earlier this year, President Motlanthe (Zuma's predecessor) had returned the bill to parliament for reconsideration, citing concerns about its constitutionality. Parliament declined to modify the bill.

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 More Power, More Problems  
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¶4. (C) In a meeting with Deputy Econ Counselor, Deputy Competition Commissioner Tembi Bonakele acknowledged that "complex monopoly" cases could be time-consuming and expensive to litigate, given the difficulty of showing that firms have acted in a "consciously parallel" manner. The law would be used sparingly, he confided, predicting that

enforcement would be limited to steel, petrochemicals, telecom, and a few other sectors that were historically dominated by state-owned monopolies (since privatized). Bonakele also confirmed reports that the Commission had not sought authority to pursue complex monopolies, preferring instead to open market inquiries into these sectors. However, the bill's drafters in the Department of Trade and Industry (DTI) were determined to give the Commission broad powers to pursue oligopolies, which they see as a serious problem in South Africa.

15. (C) Bonakele agreed that criminalizing cartels could complicate the work of the Competition Commission, which is a civil enforcement agency, not an arm of the police. In particular, he said the Commission must reach an understanding with the National Prosecution Authority (NPA) to protect the Commission's corporate leniency policy (CLP). Note: CLP shields cartel members who acknowledge wrongdoing and give evidence against other cartel members. It has played a key role in exposing several highly abusive cartels. End Note. Bonakele warned that CLP will collapse if managers and directors fear that coming forward could expose them to criminal liability. He was hopeful that NPA would agree to be bound by leniency decisions of the Commission, even though "prosecutors are jealous of their authority and discretion."

16. (C) According to Bonakele, the move to criminalize cartels was a response to the disclosure of widespread cartel activity in recent years. The public was especially shocked by the disclosure of price fixing in the bread industry, he said. Since CLP rules were clarified in May 2008, the Commission has been flooded with leniency applications, especially in the construction and industrial products sectors.

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Praise for Federal Trade Commission  
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17. (SBU) Bonakele expressed gratitude for the U.S. Federal Trade Commission's long-standing, USAID-funded program to build capacity at the Commission. "FTC has been incredibly helpful, and we have an excellent relationship," he said. Looking to the future, Bonakele said the Commission would also like to build ties to the U.S. Department of Justice and to receive technical assistance in cartels investigation. "The Commission is going to set up a unit dedicated to cartels," he said. "We want the investigations to yield evidence usable by prosecutors. We hope the U.S. can help."

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Comment  
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18. (SBU) The apartheid economy was characterized by extraordinary levels of concentration. In 1990, for example, more than 80 percent of the Johannesburg Stock Exchange was owned by only four conglomerates (Anglo-American, Sanlam, Old Mutual, and Rembrandt). Undoing oligopolies and introducing competition was a top ANC priority, leading to the enactment of the Competition Act in 1998, and to the creation of the Competition Commission a year later. In its early years, the Commission focused on scrutinizing mergers. Lately it has stepped up enforcement against cartels, uncovering abuses in sectors such as steel, fertilizers, construction, and food. The Commission has won kudos from the press and public, and is now seen as one of South Africa's most successful law enforcement agencies. Private sector and legal contacts agree it is changing the way business is done here.

GIPS